



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1433 OF 2024

Mrs. Suchita Pradeep Salian nee]
Suchita Sanjiva Shetty]
An Adult, Age 53 years, Residing at 7-B]
Corner View, Ground Floor, Anant Patil Marg]
Behind Sachin Hotel, Dadar (West)]
Mumbai – 400 028] **... Appellant.**

Versus

1. Francis Vithal Kamat]
A person of Indian Origin]
Residing at 9100, 3rd Avenue,]
North Bergen, NJ 07047, U.S.A.]
2. Mrs. Carol Dube]
Of Jaipur, Indian Inhabitant]
Residing at Nirmala Path, C Scheme]
Jaipur – 302 001, Rajasthan] **... Respondents.**

Mr. K.P. Shah for Appellant.
Mr. Mayur Khandeparkar, Ms. Pooja Patil, Mr. Sanket M. and Mr. Kartik Pandey
for Respondent No.1.
Ms. Sunila Chavan for Respondent No.2.

Coram : Sharmila U. Deshmukh, J.
Reserved on : March 20, 2025
Pronounced on : April 22, 2025

JUDGMENT:

1. The First Appeal impugns the common order dated 23rd July, 2024 passed by City Civil Court dismissing Notice of Motion No 905 of

2023 which sought the relief of unlocking of the subject premises and Notice of Motion No.1839 of 2023 seeking compensation for financial loss caused due to locking of the subject premises. These two applications were moved in Execution Application No.4121 of 2017 in S.C.Suit No.4720 of 2009.

2. The facts necessary to be explicated are that on 16th October, 2009, S.C. Suit No.4720 of 2009 was filed by the Respondent No 1 against her sister and sister in law- Mrs. Evon Azavedo seeking partition and separate possession of the suit property described as immovable property bearing No.F.P. No.808, TPS No.IV (Mahim Area), admeasuring 268.39 sq.mtrs. together with the ground plus one upper storey structure being "56 Church View", standing thereon situated at Gokhale Road (North), Dadar (West), Mumbai – 400 028. The suit property was elaborately described in paragraph 2 of the Complaint as under:

"Immovable property bearing F.P. No. 808, T.P.S. No.IV (Mahim Area) admeasuring 268.39 square meters together with the ground plus one upper storied structure being '56 Church View' standing thereon situated at Gokhale Road North, Dadar (W), Mumbai 400 028 (hereinafter referred to as "the suit property"). The said property comprises of a garden, living room, dining room, bedroom, kitchen, bathroom, toilet & verandah on the ground floor, three bedrooms, bathroom & verandah on the 1st floor & a terrace on the 2nd floor. There exists a godown on the ground floor tenanted to a third party & a meat shop standing independently which is also tenanted & currently fetches a monthly rent of Rs.500/-."

3. The Respondents *inter se* arrived at a compromise and consent decree was passed in terms of the consent terms executed on 4th April, 2015. The Consent terms recorded the agreement of the parties that the suit property, namely, immovable property bearing No.F.P. No.803, TPS No.IV (Mahim Area), admeasuring 268.39 sqr.mtrs. together with ground plus one upper storied structure being “56 Church View” and a meat shop standing independently on the said plot situated at Gokhale Road (North), Dadar (West), Mumbai – 400 028 shall be sold. The parties further confirmed and declared that the said “56 Church view” comprises of a garden, living room, dining room, bedroom, kitchen, bathroom, toilet and verandah on ground floor, three bedrooms, bathroom and verandah on the first floor and a terrace on the second floor which is in possession of the Defendant No.1. There exists a godown on the ground floor which is tenanted premises and a meat shop standing independently standing on the said plot, which is also a tenanted premises. The consent terms contained an arrangement as regards residence of the Defendant No.1 for period of two years or till the completion of the sale of the property whichever is earlier and the modalities of sale and the division of the sale proceeds.

4. On 21st September, 2017, Execution Application No.412 of 2017 was filed by the original Plaintiff under Order-XXI Rule 11(2) of Code

of Civil Procedure, 1908 (for short, “**CPC**”) seeking execution of the Consent Decree dated 4th April, 2015. The application sought issuance of notice under Order XXI Rule 22 of CPC and writ under Order XXI Rule 35(2) of CPC. The Affidavit in support of execution application contended that Defendant No.1 expired on 23rd March, 2017 without any issue and one Eric Edward D’souza-nephew of Defendant No 1 is occupying the property and has refused to vacate the suit premises.

5. Notice of Motion No.3318 of 2019 was filed by said Eric Edward D’souza seeking stay to the execution of consent decree and Notice of Motion No.2518 of 2019 was filed by the Respondent No 1 seeking issuance of writ under Order XXI Rule 35(2) of CPC directing removal of obstructionist. On 1st April, 2021, the City Civil Court dismissed the Notice of Motion No.3318 of 2019 filed by Eric D’Souza and allowed the Notice of Motion No 2518 of 2019 directing issuance of writ of warrant of possession under Order 21 Rule 35(2) of CPC. On 18th September, 2021, the deputed Bailiff attempted to execute the warrant of possession which failed due to obstruction caused by Eric D’souza. Notice of Motion No.2410 of 2021 was filed by Respondent No.1 seeking police assistance for execution of decree against Eric D’Souza and his family members.

6. On 26th July, 2022, the Executing Court allowed Notice of Motion No.2410 of 2021 and directed re-issuance of writ of

possession warrant and police assistance. The Schedule to the Writ of Possession Warrant describes the property as under:

"All that piece and parcel of land bearing F.P. No 803, TPS No IV(Mahim Area) admeasuring 268.39 sq. mtrs together with the structure standing thereon of ground plus one upper floor situate and beingi at 56, Church View along with a meat shop standing independently on the plot at Gokhale Road, North, Dadar (West), Mumbai 400 028."

7. On 28th September, 2022, fresh warrant of possession was issued which was executed on 17th October, 2022. On 21st February, 2023, Notice of Motion No.905 of 2023 was filed by the present Appellant *inter alia* seeking unlocking of the commercial premises i.e. Shop No.1 situated on final plot No.803. The supporting Affidavit pleaded deemed tenancy of the Appellant alongwith her sister and mother after the death of their father, who expired on 28th April, 1997 and that rent of the commercial premises is being paid to the landlord. It was pleaded that the warrant of possession was for removal of Eric D'souza and there was no direction by the Registrar to the bailiff to lock their commercial premises.

8. The notice of motion came to be resisted by the Respondents raising issue of limitation. The documents relied upon by the Appellants were disputed and it was contended that the premises forms part of the suit property which is reflected in the minutes of order dated 4th April, 2015 and the decree-holder is entitled to the suit

property which includes the said premises as well as the meat shop and hence the Bailiff has rightly executed the warrant of possession. It was further contended that there is no document adduced by the Appellant to show that the goods lying in the premises belongs to the Appellant and the photographs would show that the premises has not been opened and utilised for years.

9. In the affidavit-in-rejoinder, the Appellant averred that by way of present Application, she is not claiming title or tenancy rights in respect of Shop No.1 and that limited relief sought is unlocking of her shop, since the bailiff had broke open lock of the shop and thereafter, locked the premises at the instructions of the Respondent No 1 and handed over the keys to the Respondent No 1. It was contended that shop did not form part of the subject matter of suit and is used as godown for her own exclusive business and there is no inventory of the details of goods inside the shop and hence, it is clear that shop no.1 has been illegally broken at the instance of Respondent No 1.

10. The Executing Court noted the documents produced by the Appellant which were of the year 1967 to 2011 and held that the Appellant's parents may have been in possession but there is no proof of possession on date of execution of the possession warrant. On the aspect of limitation, the Executing Court held that shop was locked on 17th October, 2022 and the Appellant ought to have filed the

application within period of 30 days and therefore the Applications are barred under Article 128 of the Limitation Act. The Court further noted that the Appellant's husband was present in the Court on 10th November, 2022 and it is not the case of the Appellant was not of lack of knowledge.

11. Mr. Shah, Learned Counsel appearing for Appellant would submit that Application was filed under Section 151 of CPC and not under the provisions of Order XXI Rule 99 of CPC and therefore limitation did not apply. He submits that Order-XXI Rule 99 of CPC proceed on existence of a valid consent decree and the decree directs the Bailiff to take possession of only one residential house and one meat shop and not the Appellant's tenanted structure. He submits that as possession warrant was issued for two structures, affixing of lock on the Appellant's premises is an accidental action of the Bailiff.

12. Drawing attention to the prayers in the application, he submits that the specific relief was for unlocking of premises pleading that the warrant of possession was not in respect of their commercial premises. He submits that the Executing Court has closed his claim for tenancy by deciding the Application as one under Order-XXI Rule 99 of CPC. He submits that under the statutory provisions only the dispossession aspect is required to be adjudicated. He further points out that the fact that only the lock was affixed and no inventory was

taken as was done in respect of the other premises would indicate that there was no warrant of possession in respect of his premises. Drawing support from the decision of ***Bhanwarlal vs. Satyanarain [(1995) 1 SCC 6]***, he submits that the Executing Court was bound to conduct an enquiry into the tenancy rights and limitation for which evidence is required to be led.

13. *Per contra*, Mr. Khandeparkar, Learned counsel appearing for the Respondent has taken this Court through the Consent Decree and submits that Clause 3 of minutes of order makes specific reference to the godown situated on the ground floor and only meat shop is an independent structure. He would further submit that in the affidavit-in-rejoinder, the Appellant has accepted that the Respondent No.1 has taken forcible possession of the closed premises under the guise of execution of consent decree and therefore, the only applicable provision would be Order-XXI Rule 99 of CPC. He submits that Order-XXI Rule 101 of CPC, does not provide for the Application to be tried like a suit or that the entire procedure as prescribed under the CPC for the purpose of trial is required to be followed. He would further submit that as the Appellant in rejoinder state that she does not claim tenancy rights in the present proceedings, there was no question of leading any evidence on that aspect. He would submit that it is the Appellant's own case that the dispossession had taken place on 17th

October, 2022 and the finding of the Court is that Appellant's husband had attended the Court on 10th November, 2022 and therefore, there was no question of date of acquiring knowledge for purpose of limitation and thus no evidence is required. He would further point out Ground (d) in the Appeal memo stating that on the said date itself the husband of Applicant informed that the possession has been taken illegally and reported his objection to Respondent No.1. He submits that even if it is accepted that evidence was required to be led the Appellant had not filed any Application for purpose of leading evidence. He would further submit that all documents to show possession are for the period 1996 and there is nothing to show dispossession on 17th October, 2022.

14. He would further submit that Section 151 of CPC cannot be invoked in view of the substantial provisions of Order-XXI Rule 99 of CPC available for the Applicant. He submits that there is nothing to show that the Applicant was dispossessed on 17th October, 2022 and therefore, there was no question of any inventory. He relies upon the decision in ***Silverline Forum Pvt. Ltd. vs. Rajiv Trust [(1998) 3 SCC 723]*** to contend that adjudication under Order-XXI Rule 97(2) of CPC need not necessarily involve a detailed enquiry or collection of evidence.

15. In rejoinder, Mr. Shah would submit that it is the duty of the Court to frame necessary issues. Pointing out to the averments in the plaint, he submits that plaint speaks of the residential property which is separate from the godown located on the ground floor which is accepted as tenanted property and therefore warrant of possession has to be read in that context.

16. The Learned Counsel for the parties have addressed this Court on the rejection of Notice of Motion No.905 of 2023 as the fate of the said application would decide the issue of compensation claimed in Notice of Motion No 1839 of 2023.

17. The main bone of contention is the nature of Application, i.e., Notice of Motion No.905 of 2023 filed by the Appellants. The facts of the case and the submissions advanced would give rise to the following issues for determination:

- (i) Whether the subject premises is part of suit property and consent decree ?
- (ii) Whether the writ of warrant of possession was issued only for handing over possession of property in possession of obstructionist ?
- (iii) Whether the Notice of Motion No 905 of 2023 filed by the Appellant seeking unlocking the subject premises constitutes an application under Order-XXI Rule 99 of CPC and thus attracts Article 128 of Limitation Act, 1963?

(iv) Whether the Appellant was in possession of the subject premises on date of execution of the decree on 17th October, 2022 ?

18. The Respondent No.1's S.C. Suit No.4720 of 2009 sought partition and separate possession of the suit property to which the Appellant was admittedly not a party. The suit property has been described in paragraph No.2 of the plaint as immovable property bearing F.P. No.803, TPS No.IV (Mahim Area) admeasuring 268.39 square meters together with the ground plus one upper storied structure being '56 Church View' standing thereon situated at Gokhale Road North, Dadar (W), Mumbai 400 028. Clauses (2) and (3) of the minutes of the order reads as under:

- "2. By consent of the parties hereto, the suit property namely, immovable Property being F.P.No.803, TPS No. IV (Mahim Area) admeasuring 268.39 sq.mts. Together with the ground plus one upper storied structure being "56, Church View" and a meat shop standing independently on the said plot situated at Gokhale Road North, Dadar (West), Mumbai 400 028, shall be sold.
3. The Parties hereto confirm, agree and declare that the said "56, Church View" comprises of a garden, living room, dining room, bedroom, kitchen, bathroom, toilet and verandah on the ground floor, three bedrooms, bathroom and verandah on the 1st floor and a terrace on the 2nd floor which is in the possession of the Defendant No.1. There exists a godown on the ground floor which is tenanted premises and the meat shop standing independently on the said plot is also a tenanted premises."

19. Clause (2) re-produced above describes the suit premises as land together with ground plus one upper storied structure and the meat shop standing independently on the plot. Clause (3) elaborates the residential premises in possession of Defendant No.1 and describes the godown on ground floor as tenanted premises and the meat shop standing independently on the said plot which is also tenanted premises. The description of the suit premises is contained in Clause (2) as ground plus one upper storied structure and the meat shop. The premises, which according to Appellant was in her possession, for sake of convenience is referred to as subject premises, is stated to be on the ground floor which is not disputed. As the suit premises included the entire structure of ground plus one upper storied structure, there was no necessity of separate description of the subject premises located on the ground floor of the said structure. As the meat shop was standing independently on the plot, the same was described separately. Clause 3 only describes the areas which were in possession of Defendant No.1 and separates the tenanted premises by description for purpose of excluding them as not being in possession of Defendant No 1.

20. The suit was filed for partition and separate possession of property being Final Plot No 808 alongwith the structure standing thereon. There is no reason why the subject premises which is

admittedly part of the ground floor structure located on the said plot would not form part of the suit premises and would be solely excluded from partition. In fact, the exclusion of the subject premises would render the suit as one for partial partition which would not be maintainable. As the suit was for partition, the subject premises would form part of the suit property and consequently subject matter of the Consent Decree.

21. The Consent Decree was put in execution by the Respondent No 1 and in view of the obstruction caused by the nephew of Defendant No 1 led to filing of Notice of Motion No.2518 of 2019 seeking removal of the obstruction, which was adjudicated and writ of warrant of possession was issued under Order XXI Rule 35(2) of CPC. As the resistance continued, Notice of Motion No.2410 of 2021 was filed by Respondent No 1 seeking police assistance for execution of consent decree which was allowed by order dated 26th July, 2022 and the Court ordered re-issuance of possession warrant and directed providing of police assistance in execution of the decree. The schedule to the writ of possession warrant describes the immovable property as under:

"SCHEDULE
IMMOVABLE PROPERTY

All that piece and parcel of land bearing F.P. No 803, TPS No IV (Mahim Area) admeasuring 268.39 sq. mtrs together with the structure standing thereon of ground plus one upper floor situate and being at 56, Church View alongwith a meat shop standing independently on the plot at Gokhale Road, North, Dadar (West), Mumbai 400 028."

22. The writ was to command the handing over of possession of the suit premises described in the schedule to the Respondent No 1 and 2 by ordering removal of the obstructionist. As the possession warrant was issued for execution of consent decree by handing over delivery of the immovable property to the decree holders, it cannot be accepted that the possession warrant was confined only to the portion occupied by the obstructionist. The schedule to warrant of possession establishes this position. The Bailiff's report on execution of warrant reports that the execution was completed "by putting one lock on the back door of kitchen, first floor of the main door, ground floor one front door of the suit premises and one on the main gate of the compound gate and one lock on the shop outside attached with the suit premises and handed over the keys to the Plaintiff." It would be pertinent to note that the Bailiff's report does not state that any lock on any portion of the suit premises was broke open during execution of the Consent Decree.

23. The admitted position is that the possession of the suit premises including subject premises was handed over by the Bailiff to the Respondents in execution of the warrant of possession. The Appellant filed the concerned application seeking *inter alia* unlocking of the subject premises and to restore the possession to the Appellant. The affidavit initially pleaded tenancy rights in the subject premises. The reply Affidavit raised objection on limitation and jurisdiction apart from the denial of the claim of Appellant on merits. In the Affidavit in rejoinder, the Appellant specifically averred that she is not claiming title or tenancy rights and the contention is that the subject premises was not part of the suit or the execution application, which was for removal of obstruction and the claim is for restoration of possession.

24. The pleadings in the Application make it clear that the grievance of the Appellant is that she has been dispossessed from the subject premises in execution of the consent decree and possession be restored.

25. The statutory scheme of Order-XXI Rules 97 to Rule 105 of CPC provides the remedy to the person complaining of dispossession in execution of decree. Order-XXI Rule 99 of CPC provides that where any person other than judgment debtor is dispossessed of immovable property by decree holder, he may make an application to the Court

complaining of such dispossession. Order-XXI Rule 100 of CPC provides that upon determination of questions referred to in Rule 101, the Court shall in accordance with such determination pass an order directing the applicant to be put in possession or otherwise. Rule 101 vests jurisdiction in the Executing Court dealing with the application to determine all questions including questions relating to right title or interest in the property notwithstanding anything to the contrary contained in any other law for the time being in force. Rule 103 provides that where any application has been adjudicated under Rule 98 or 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.

26. The nature of relief sought in the Application places the Application as one under Rule 99 of Order-XXI claiming dispossession and seeking relief which could be granted under Rule 100 of Order-XXI after determination of the right under Rule 101. As rightly pointed out by Mr. Khandeparkar, the provisions of Section 151 of CPC which only protects the inherent powers of the Court cannot be said to apply where there is substantive provision available under CPC. The tenancy right which was initially claimed in the Application was expressly given up by the Appellant in the Affidavit in rejoinder and the only issue presented for adjudication was the issue of restoration

of possession on the ground that the subject premises was not part of the suit premises and not subject matter of warrant of possession.

27. To address the aspect of dispossession, the Executing Court has taken into consideration the documents produced on record and has rightly held all the documents are of the year 1996 or prior thereto and cannot be said to be proof of the fact that on the date of execution of the decree i.e. 17th October, 2022, the Applicant was in possession of shop. Mr. Shah has not assailed the said finding and there is no material demonstrated to show possession on 17th October, 2022. The electricity bill of the year 2019 which shows zero consumption of electricity militates against the case of Appellant's possession. The Appellant has not been able to prove that she was in possession of the subject premises on 17th October, 2022, i.e., on date of execution of consent decree.

28. In the context of claim for compensation, the Executing Court held that for adjudication of the same, it was necessary for the Appellant to bring on record material to show that she was tenant or licensee on date of execution of decree. The Executing Court noted the contention that the Appellant claimed that her parents were using the suit premises and license was issued in their favour, which rights are not inheritable. The provisions of Order 21 Rule 101 of CPC vests jurisdiction in the Executing Court to determine all issues of right title

and interest in the premises raised before the Executing Court relevant to the adjudication of the application, which in this case was as regards the claim for compensation. As the Appellant specifically claimed that she is not claiming title or tenancy rights, there is no adjudication of the Executing Court on the tenancy rights of the Appellant. There is no finding of the Executing Court on the Appellant's tenancy rights and it has only considered whether the possession can be handed back to the Appellant and has dismissed the claim on ground of limitation by rightly treating the application as one under Order 21 Rule 99 of CPC.

29. It would be relevant to note the arguments of Advocate of the Appellant before the Executing Court recorded in paragraph 14 of the impugned judgment that though the decree holder submitted that the Applicant ought to have filed separate Application to seek possession, the Court had ample power to deal and decide the notice of motion under Order-XXI Rule 99 of CPC and that under Order-XXI Rule 99 of CPC does not prescribe the period of limitation within which such application needs to be filed. It is therefore clear that before the Executing Court, the Appellant proceeded on the basis that Application was filed under the provisions of Order-XXI Rule 99 of CPC and not under Section 151 of CPC. The adopting of remedy of filing of First Appeal against the impugned order would demonstrate

that the Appellant treated the Application as filed under Order-XXI Rule 99 of CPC and the order as decree as provided under Order-XXI Rule 103 of CPC. Pertinently, Ground (G) of the Appeal Memo reads as under:

“G. The Ld. Trial Court erred in summarily rejecting the Notice of Motion, as an Application under Order 21 Rule 97 has to be treated as a suit and necessary issue have to be framed and further parties are given a fair chance to prove their respective cases.”

30. I am therefore not inclined to accept the contention that the Application was filed under Section 151 of CPC. The inherent powers under Section 151 of CPC cannot be invoked when the provisions provide for specific remedy against the dispossession.

31. The contention of Mr. Shah that absence of carrying out inventory of the goods lying the subject premises shows that the Applicant's premises could not have been locked in execution of warrant possession overlooks the Bailiff's report which categorically states that as the obstructionist was unable to carry the movable articles, the inventory was done and handed over to the representative of Plaintiff for safe custody. That apart, as the Appellant has not been able to demonstrate possession on 17th October, 2022, the submission on the ground of inventory also fails.

32. As the Appellant gave up the right to adjudicate the tenancy

rights, there was no question of leading any evidence. In any event, there was no application by the Appellant seeking permission to lead evidence. In the case of ***Silver Line Forum Pvt. Ltd. (supra)***, the Hon'ble Apex Court has held that the adjudication mentioned in Order-XXI Rule 97(2) of CPC, need not necessarily involve a detailed inquiry or collection of evidence and the Court can direct the parties to adduce evidence for such determination, if the Court deems it necessary. It is thus not necessary that the Application under Rule 101 of Order-XXI of CPC must be tried as a suit. Even otherwise as the Appellant gave up determination of her tenancy right or title in the subject premises and the application on its own showing was barred by limitation, there was no question of any evidence being led.

33. Irrespective of whether the Appellant had any right, title or interest in the property or was a tenant of the premises, there could have been an adjudication only if the Application under Order-XXI Rule 99 of CPC was filed within the period of limitation. In the present case, the case of Appellant is that on 17th October, 2022, the subject premises was locked by the Bailiff and not that the Appellant was unaware of the execution of the consent decree on 17th October, 2022. It is also not disputed that husband of the Applicant was present in Court on 10th November, 2022 and was therefore aware of the proceedings. Ground (d) of Appeal Memo pleads that on the said

date itself, the Appellant's husband informed the Appellant that possession has been illegally taken and reported his objection to Respondent No 1. The application thus had to be filed within period of 30 days from the date of dispossession as per Article 128 of the Limitation Act, which is in the present case expired on 17th November, 2022 and the application was clearly barred by limitation. The pleadings on record establishes that the Application was barred by limitation and no evidence was required to be led.

34. The impugned judgment refers to the decision of the Apex Court in the case of ***Damodaran Pillai*** (supra) and ***Aarifaben Yunusbhai Patel*** (supra), where the Hon'ble Apex Court has held that the provisions of Section 5 of the Limitation Act is not applicable to proceedings arising out of Order-XXI of CPC. The inapplicability of the provisions of Section 5 of Limitation Act coupled with the admitted position of the Application being filed beyond the period of 30 days leads to an inevitable conclusion that the Application was barred by law of limitation. To overcome the obstruction of limitation, before this Court, the contention of Mr. Shah was that the application was filed under Section 151 of CPC, which is contrary to the stand before the Executing Court and the ground in the Appeal Memo. As discussed above, the contention cannot be accepted as the grievance in the Application was of dispossession by the decree holder and for

redressal of the said grievance the remedy is necessarily an application under Order-XXI Rule 99 of CPC.

35. In light of the above, First Appeal fails and stands dismissed.

36. In view of dismissal of Appeal, Civil/Interim Application, if any, does not survive and the same stands dismissed.

[Sharmila U. Deshmukh, J.]